In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-7

THOMAS J. McRAE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecutor improperly instructed a government witness not to speak with petitioner's attorney; that the prosecutor engaged in improper questioning of witnesses; and that the prosecutor's closing argument was improper.

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted of simple assault, in violation of 22 D.C. Code 504, and of carrying a pistol without a license, in violation of 22 D.C. Code 3204.[1] Petitioner was sentenced to concurrent terms

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[1]The information also charged petitioner with possession of a prohibited weapon in violation of 22 D.C. Code 3214(b), but the jury acquitted him on that count.

of 180 days on each count. The court suspended execution of the sentence and imposed a one-year term of probation. The court of appeals affirmed *per curiam* in an unreported judgment (Pet. App.).

Briefly, the evidence showed that petitioner was driving three women home following an evening of socializing (Tr. 32, 98, 101). An argument ensued and petitioner ordered the women to leave his car (Tr. 52-53). Shortly after they did so, petitioner left the car and extended his arm toward the group. The women claimed to have seen two successive orange sparks and to have heard the sound of two shots from a gun (Tr. 35-36, 103). They reported the incident to the police (Tr. 37, 53).

1. Petitioner's counsel attempted to impeach one of the complaining witnesses, Shirley Donaldson, by using an alleged prior inconsistent statement contained in a police department form (Tr. 61-63). The government objected because it was not possible to determine which part of the statement of facts on the police form could be ascribed to the particular witness (Tr. 63-64). The court sustained the objection (Tr. 67)[2] and ordered a recess to allow defense counsel and the prosecutor to seek clarification from the investigating officer who was alleged to have been present when the complainants gave their statements to the police (Tr. 67-68).

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[2]The court stated that it "would have some question about using this document to attempt to impeach her, unless there is some showing that the impeaching part of it is the statement that she gave. If this is a composite of what other witnesses, and the police gave, it would seem to me that this witness cannot be held accountable for that * * * " (Tr. 65).

During the recess, the investigating police officer, Detective Sergeant Tapscott, known to the prosecutor as a close friend of petitioner, was instructed by the prosecutor not to speak with defense counsel except in the presence of the prosecutor (Tr. 69-70).[3] However, this instruction was immediately countermanded by the trial court, which ordered that petitioner's access to Tapscott should not be circumscribed in any manner (Tr. 73-74). The defense later called Tapscott as its own witness (Tr. 165). It is thus clear that the prosecutor's desire to insulate Tapscott from the defense did not effect his ability or apparent desire to cooperate with petitioner. Accordingly, we do not perceive how petitioner was prejudiced by the short-lived directive of the prosecutor.

Gregory v. *United States*, 369 F. 2d 185 (C.A.D.C.), certiorari denied, 396 U.S. 865, relied on by petitioner, is inapposite. In *Gregory*, defense counsel was denied access to the government's witnesses before trial because the prosecutor had advised them against talking to anyone unless he was present. The court ruled that witnesses belong to neither prosecution nor defense, which should both have equal access to witnesses. There is no allegation here that Tapscott was not available to the defense prior to trial or that he was a hostile witness unwilling to talk to the defense. Indeed, his long friendship with petitioner, his many conversations with petitioner even before his arrest (Tr. 139), and his later testimony as a defense witness, would make such an allegation difficult

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[3]Tapscott had a close friendship with petitioner whom he had known since their school days together in 1956 or 1957 (Tr. 136-137). The prosecutor was aware that Tapscott had delayed arresting petitioner for almost six days before "inviting" petitioner to present himself at the station to be arrested (Tr. 136-137) and that Tapscott had arranged for an interview with an Assistant United States Attorney in an effort to have the case against petitioner dismissed before trial (Tr. 86).

to sustain. Moreover, while the prosecutor sought to restrict defense counsel's access to Tapscott during the recess—for what appear to have been arguably legitimate reasons in the circumstances, despite the language of *Gregory*—the court immediately countermanded the prosecutor's instructions and made Tapscott available to speak with defense counsel out of the presence of the prosecutor. Petitioner has failed to demonstrate any prejudice.

2. Petitioner contends that the prosecutor engaged in improper cross-examination on several occasions and that this conduct required the court to declare a mistrial. These claims were termed "insubstantial" by the court of appeals, which correctly stated: "In each instance counsel's objection was sustained and on several occasions either a clarifying instruction was given or the jury was instructed to disregard the questions to which objections had been made. In no instance was a mistrial warranted" (Pet. App. 2).[4]

3. Finally, petitioner contends that the prosecutor engaged in improper rebuttal argument in a number of respects (Pet. 28-36). Without responding specifically to each alleged impropriety,[5] we submit that on the record in this

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[4]The court's comments were also directed at petitioner's contention that the prosecutor sought improperly to probe the attorney-client privilege. We rely on the court's conclusion in that regard.

[5]To the extent that these allegations relate to the prosecutor's argument regarding the conduct of Sergeant Tapscott (Pet. 30-33), stronger inferences than mere failure to follow proper procedures could have been drawn. After all, Tapscott, a long-time friend of petitioner (see note 3, *supra*), exhibited extreme reluctance as a prosecution witness to incriminate petitioner and ready eagerness as a defense witness to exonerate him. See, *e.g.*, Tr. 130-132, 136-138, 165-168. The prosecutor's argument regarding failure to follow proper procedures, far from constituting error, was most charitable in the circumstances.

case, the court of appeals correctly concluded that "the prosecutor's remarks, if improper, were not so prejudicial as to warrant reversal. * * * [T]he combined effect of the alleged errors did not establish a pattern of prosecutorial misconduct which could be said to have denied appellant a fair trial" (Pet. App. 2). As this Court has recently reminded:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, * * * like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. * * * [A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations. [*Donnelly* v. *DeChristoforo,* No. 72-1570, decided May 13, 1974, slip op., pp. 9-10.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.